BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOME BUILDERS ASSOCIATION
OF LANE COUNTY,
Petitioner,

and

DAN NEAL,
Intervenor-Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

PAUL T. CONTE, RENE KANE,
CAROLYN JACOBS, DEBORAH HEALEY,
MARK STEVEN BAKER, MARILYN MOHR,
CHARLES SNYDER and KEVIN MATTHEWS,
Intervenors-Respondents.

LUBA Nos. 2008-148 and 2008-149

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed a petition for review and argued on behalf of petitioner. With him on the brief was the Law Office of Bill Kloos, PC.

Dan E. Neal, Eugene, filed a petition for review and represented himself.

Emily N. Jerome, Eugene, filed a response brief and argued on behalf of respondent. With her on the brief was Harrang Long Gary Rudnick P.C.

Paul Conte, Rene C. Kane, Carolyn Jacobs, Deborah Healey, Charles Snyder, Marilyn Mohr and Kevin Mathews, Eugene, filed a response brief. Paul Conte argued on his own behalf.

Jon Chandler, Salem, filed an amicus brief on behalf of Oregon Home Builders

Association and National Association of Home Builders.

HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member, participated in the decision.

AFFIRMED (LUBA No. 2008-148) 06/12/2009
REMANDED (LUBA No. 2008-149)

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals two city ordinances (Ordinances 20418 and 20417) that adopt a number of amendments to the Eugene Code (EC). The amendments that are challenged in this appeal (1) lower the maximum main building height that is permitted in the city's R-3 (Limited High-Density Residential) and R-4 (High Density Residential) zones in a specific area next to the University of Oregon, (2) increase off-street parking requirements for multiple family development in R-3 and R-4 zones in two neighborhoods near the University of Oregon, and (3) amend EC provisions concerning stormwater management.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new issues raised in respondent's and intervenors-respondents' briefs. The motion is granted.

AMICUS BRIEF

The Oregon Homebuilders Association and the National Association of Homebuilders move for permission to file an amicus brief. The motion is granted.

FACTS

A. Maximum Building Heights in the R-1, R-3 and R-4 Zones South of the University of Oregon (EC 9.2751(3))

As a general rule, the maximum building heights in the R-1, R-3 and R-4 zones are 30 feet, 50 feet and 120 feet, respectively. EC Table 9.2750. Those general maximum building heights, as set out in EC Table 9.2750, are not altered by the challenged ordinances.

While EC Table 9.2750 sets out the development standards that apply generally within residential zones, including the aforementioned maximum building heights, EC 9.2751, which follows that table, adopts a number of "Special Development Standards" that apply in addition to or in place of the standards in EC Table 9.2750. One of those Special Development Standards is EC 9.2751(3). Under EC 9.2751(3), building heights in R-3 and R-4 zones are further restricted where the R-3 or R-4 zone adjoins an R-1 zone. Both before

and after the challenged ordinances, as a general rule in the R-3 and R-4 zones, buildings located within any portion of an R-3 or R-4 zone that is closer than 50 feet to an R-1 zone can be no taller than 30 feet tall. EC 2.9751(3) has the effect of extending the R-1 zone 30 foot maximum building height restriction for a distance of 50 feet into adjoining R-3 and R-4 zones, so that there is a 50-foot deep, 30-foot high step-up to the higher maximum building heights in the R-3 and R-4 zones, where they adjoin an R-1 zone. This generally applicable step-up is carried forward in the challenged ordinances.

Ordinance 20418 adopts a different step-up regulatory regime for a 16-block area located south of the University of Oregon. That area is bounded by 18th Street on the north, 20th Street on the south, Agate Avenue on the east and Hilyard Avenue on the west. Those blocks are zoned a mixture of R-1, R-3 and R-4. The sixteen blocks are separated from the University of Oregon by 18th Street. The zoning for those blocks generally transitions as you proceed south away from the university from R-4 zoning (across 18th Street from the University of Oregon) to R-3 and then to R-1 zoning as you approach and cross into the large residential neighborhood to the south of the 16-block area. In its brief the city sets out the challenged amendment to EC 2.9751(3) in legislative format (bold/italic text added, bracketed, line-through text deleted), and we set out the amendment in that format below:

(3) Building Height

(a) ***Except as provided below***, [~~I~~] ***i***n the R-3 and R-4 zone, the maximum building height shall be limited to 30 feet for that portion of the building located within 50 feet from the abutting boundary of, or directly across an alley from, land zoned R-1.

(b) For that area bound by Hilyard Street to the west, Agate Street to the east, East 18th Avenue to the north and East 20th Avenue to the south:

1. In the R-3 zone, the maximum building height shall be limited to 35 feet for that portion of the building located within 160 feet from the abutting boundary of, or directly across an alley from, land zoned R-1.

> ***2. In the R-4 zone, the maximum building height shall be limited to 35 feet for that portion of the building located within 50 feet from the abutting boundary of, or directly across an alley from, land zoned R-1. It shall be limited to 50 feet for that portion of the building located within 175 feet from land zoned R-3, and shall be limited to 75 feet for that portion of the building located within 176 feet and 225 feet of land zoned R-3.***

Under Ordinance 20418, for R-3-zoned property within this 16-block area, the 30-foot high step-up in maximum building height that extends 50 feet into the R-3 zone is replaced with a 35-foot high step up that extends 160 feet into the R-3 zone. In other words, the step-up is a little higher (35 feet versus 30 feet) and extends farther into the R-3 zone (160 feet versus 50 feet).

Under Ordinance 20418, for R-4 zoned property, 30-foot step-up is replaced with a three step-up regime. The first step extends 50 feet into the R-4 zone and is 35 feet high. The second step into the R-4 zone (between 50 feet from the R-1 zone and 175 feet from the R-1 zone) is 50 feet high. The third step (between 175 feet from the R-1 zone and 225 feet from the R-1 zone) is 75 feet high. Within the 16-block area, a building may be built to the full 120-foot height allowed by EC Table 9.2750, only if it is more than 225 feet from an adjoining R-1 zone. For property that is closer than that to the R-1, buildings must observe the lower step-ups in maximum building heights described above.

B. Required Off-Street Parking for Multifamily Development (EC Table 9.6410)

EC Table 9.6410 sets out off-street parking requirements for uses allowed under the EC. One of those uses is multiple family dwellings. Prior to the challenged amendments, one parking space per multiple family unit was required by EC Table 9.6410. Ordinance 20418 amends EC Table 9.6410 to adopt different off-street parking requirements in two neighborhoods. That amendment is set out below in the same legislative format that was used above for the amendments to EC 9.2751(3):

Table 9.6410 Required Off-Street Motor Vehicle Parking	
Uses	**Minimum Number of Required Off-Street Parking Spaces**
Residential	
Dwelling	
~~[Multiple Family (3 or more dwellings on same lot]~~	~~[1 per dwelling]~~
Multiple Family developments in the R-3 and R-4 zones within the boundaries of the City recognized West University Neighbors and South University Neighborhood Associations.	***1 space per studio or 1-bedroom unit*** ***1.5 spaces/unit per 2-bedroom unit***** ***2 spaces/unit per 3-bedroom unit**** ****.5 spaces required for each additional bedroom beyond 3 bedrooms*** *****Fractions of .50 are rounded up to the next whole number.***
Multiple Family – all other areas	***1 per dwelling***

As an example of the effect of the above amendment, before the amendment, an apartment building with 20 two-bedroom units would require 20 off-street parking places (20 X 1 = 20). With the above amendment, that apartment building would require 30 off-street parking spaces (20 X 1.5 = 30). As another example, a building with 21 four-bedroom apartments would require 21 off-street parking places before the challenged amendment (21 X 1 = 21). With the above amendment to EC Table 9.6410, that 21-unit apartment building would require 53 parking spaces (21 X 2.5 = 52.5 + .5 = 53).

Petitioner's first through seventh and ninth assignments of error challenge the amendments adopted by Ordinance 20418 on various grounds.

C. Stormwater Management

EC 9.6790 directs the City Manager to adopt a Stormwater Management Manual. The second ordinance that is challenged in this appeal, Ordinance 20417, amends EC 9.6790 to specify certain goals with which the Stormwater Management Manual must be consistent. Petitioner challenges that amendment in its eighth and ninth assignments of error.

INTRODUCTION

The first seven assignments of error, particularly the third through seventh assignments of error, assume that the new building height limits in the 16-block area south of the university and the new off-street parking requirements in the South and West University Neighborhoods necessarily will preclude residential development at the maximum allowed density in those areas and will have the effect of increasing the number of trips by automobile and the resultant pollution and greenhouse gases. As we explain below, the EC regulates residential development directly and also imposes development standards that may have the indirect effect of reducing the achievable development densities. The EC amendments that are the subject of this appeal could have indirect effects on development densities and the parties have very different ideas about the likely impact of the disputed EC amendments on residential development densities. The parties also have very different ideas about the likely impacts of the disputed amendments on traffic and traffic related pollution.

A. Direct Regulation of Residential Development Density

The Eugene Code regulates development density directly and indirectly. The Eugene Code regulates residential development density directly by imposing both minimum and maximum density requirements. Within the R-3 and R-4 zones, residential development must achieve a "Minimum Net Density Per Acre" of at least 20 units. EC Table 9.2750. That means within the R-3 and R-4 zones, residential development at a net density of less

than 20 units per acre may not be approved. The EC also imposes a maximum density in these zones. Within the R-3 zone, the "Maximum Net Density per Acre" is 56 units. EC Table 9.2750. With the R-4 zone, the "Maximum Net Density per Acre" is 112 units. *Id*. These minimum and maximum density requirements are not changed by the disputed amendments. This means that under EC Table 9.2750, both before and after the challenged amendments, the permissible residential development density within the R-3 zone ranges from a low of 20 units to a high of 56 units per net acre, and the permissible residential development density within the R-4 zone ranges from a low of 20 units to a high of 112 units per net acre.

B. Indirect Regulation That May Affect Residential Development Density

Although required minimum residential density and permissible maximum residential density in the R-3 and R-4 zones under EC Table 9.2750 are unchanged, petitioner contends the new (lower) maximum building heights in parts of the 16-block area south of the university and the new off-street parking regulations in the two university neighborhoods will have the indirect effect of preventing development from achieving the R-3 and R-4 maximum 56 and 112 units per acre densities in those areas.

1. Petitioner's View of the Indirect Effect

One developer testified below that the reduced building height in the 16-block area will reduce potential building envelopes by

> "approximately 25% in the R4 zone immediately south of the U of O. Over an area of about 22 acres, this results in a loss of about 600 potential dwelling units—not a minor result." Record 912.

That same developer went on to contend that the increased off-street parking requirements for multiple family dwellings in the two university neighborhoods would similarly preclude achieving the maximum densities allowed under the EC in the R-3 and R-4 zone for multiple family dwellings in the two university neighborhoods:

> "[The increased off-street parking required for multiple family dwellings in the two university neighborhoods] will result in [an] increase of parking requirements to 200% of current for 2 bedroom units to 400% of current for 5 bedroom units. I have reviewed the impact on eight recent projects of ours in these neighborhoods – two in design, four in construction now, and two recently completed. None of these projects could be built as designed. The amount of land required for parking limits the remaining space, used for out door living, pedestrian circulation, landscaping, and lastly – dwelling units, such that actual achievable density is reduced to ½ to 1/3 of current. Thus, we put cars before people, and actually invite more cars into the neighborhood, while reducing density." Record 912.[1]

The developer went on to contend that "[a]s a practical matter, this will reduce the density that can be achieved by about half, in some cases 2/3." Record 917.

2. Intervenors-Respondents' View of the Indirect Effect

Intervenors-respondents spend 17 pages in their brief arguing that the developer's testimony quoted above for the most part fails to identify the assumptions or bases for his conclusions and vastly overstates the likely impact of the disputed changes. Intervenors-respondents' Brief 10-27. Intervenors-respondents ultimately take the position that the regulations are unlikely to prevent individual development proposals from achieving the maximum residential development densities authorized by EC Table 9.2750 in either the R-3 or R-4 zone.

Intervenors-respondents particularly dispute petitioner's contention that the new, lower maximum building heights will result in a loss of 600 units in the R-4 zoned portion of the 16-block area. Intervenors-respondents point out that within the R-4 zone, where the amendments will impose lower maximum building heights in R-4 zoned areas that are located within 225 feet of an R-1 zone, the percentage reduction in the normal 120-foot maximum building height would only necessarily result in a reduction in the achievable maximum development density if a 12-story building that takes full advantage of the 120-

[1] A table that purports to display the impact of the disputed changes on the eight projects referenced in the quoted text appears at Record 923.

foot maximum height limit is required to achieve the allowed 112 units per net acre.[2] Intervenors-respondents contend that is clearly not the case, and point to a table in the record that shows existing developments with 3.5 and 4 stories that have achieved densities of 112 and 110 units per net acre, respectively. Record 385. A developer will simply need to achieve the maximum permitted 112 units per net acre in the R-4 zone in a shorter building. That may require a different design to achieve the maximum permitted residential density in the three, five or seven story buildings that are now possible in the step-up transition area within the R-4 zoned portion of the 16-block area, but intervenors-respondents contend there is no reason to believe the permissible maximum development density cannot be achieved in such shorter buildings.[3]

Intervenors-respondents also contend that petitioner's reasoning regarding the likely effect of the new off-street parking requirements is flawed as well. In particular, intervenors-respondents contend that petitioner overlooks EC 9.6410(3)(a), which reduces the amount of off-street parking that is required under EC Table 9.6410, both before and after the disputed amendment to EC Table 9.6410. EC 9.6410(3)(a) provides as follows:

> "A parking reduction of up to 50% of the minimum requirement in the /ND overlay zone and up to 25 percent of the minimum requirement in all other zones is allowed as a right of development. In addition to these reductions, a parking reduction of 25% of the minimum required off-street parking is allowed for shared off-street parking."

Thus, if an applicant wanted to take advantage of EC Table 9.6410, the amount of required off-street parking for multiple family housing in the two university neighborhoods under EC Table 9.6410 before the disputed amendments was .75 parking spaces per unit. That EC 9.6410(3)(a) 25 percent reduction would also apply to the new off-street parking

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[2] At oral argument the parties appeared to generally agree that each story of a building requires approximately 10 feet of building height so that a 30-foot building would likely include three stories.

[3] Intervenors-respondents also point out that the maximum building height in the 16-block area within 50 feet of R-1 zoned property (for R-4 zoned property) is actually increased slightly by Ordinance 20418 (from 30 feet to 35 feet).

requirements for multiple family development in the two university neighborhoods. Intervenors-respondents contend that the developer's failure to recognize the continued application of EC Table 9.6410 led him to seriously overstate the magnitude of the increase in off-street parking requirement for multiple family dwellings in the two university neighborhoods.

Finally, intervenors-respondents contend that there are a number of recent examples of multiple family development in the university neighborhoods that comply with or exceed the new off-street parking standard. Record 385. We understand intervenors-respondents to contend that more attention to design may be required in the future and that in some cases parking may need to be constructed underground, but so long as those measures are considered there is no reason to expect that the new off-street parking requirements will preclude multiple family development at the maximum allowed density in the R-3 or R-4 zones in the two university neighborhoods.

We agree with intervenors-respondents that petitioner appears to significantly overstate the impact of the disputed amendments. In particular, we agree that the reduced maximum building heights in the R-4 step down areas need not result in a direct or proportional reduction in development density and need not preclude development that achieves the permissible maximum residential density per net acre. As far as we can tell, the precise impact of the disputed changes on the ability of a particular applicant to achieve the maximum permissible residential development densities will depend on a number of variables. However, based on our review of the evidence cited by petitioner and intervenors-respondents, while it may be more expensive to construct underground parking and achieving the maximum allowed residential density in the R-4 zone may be more difficult, particularly where the maximum building height is 35 feet, the record simply does not support petitioner's contention that the disputed amendments necessarily will preclude

achievement of maximum residential development densities in the 16-block area and the two university neighborhoods.[4]

With that introduction to the parties' dispute regarding the likely impact of the EC amendments, we now turn to petitioner's assignments of error.

FIRST ASSIGNMENT OF ERROR

The city has different kinds of zones, including base zones, overlay zones and special area zones. We understand petitioner to contend that because the challenged amendments regulate building height differently in a 16-block R-3 and R-4 zoned area than elsewhere in the city's R-3 and R-4 zones and regulate off-street parking requirements differently in two university neighborhoods than elsewhere in the R-3 and R-4 zones they are *de facto* special area zones. In its first assignment of error, petitioner argues the city has adopted a stealth special area zone without applying and demonstrating compliance with the criteria that govern creation of special area zones.

EC 9.3000 explains the purpose for creating Special Area Zones.[5] There are a number of criteria that govern application of Special Area Zones. Among those criteria is EC 9.3020(1)(b), which requires the city to find that the area that is to be included in the Special Area Zone:

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[4] As we explain below, the likely impact of the increased off-street parking requirements on traffic in the neighborhood is somewhat less clear.

[5] EC 9.3000 provides:

> "**Purpose for Creating Special Area Zones**. The S Special Area zone provides procedures and criteria for recognition of areas of the city that possess distinctive buildings or natural features that have significance for the community and require special consideration or implementation of conservation and development measures that can not be achieved through application of the standard base zones. In some cases, an S Special Area Zone is applied to implement a plan for an area identified for nodal development. Application of S Special zone to a lot containing a specific building, structure, object, site or archeological resource that qualifies as an historic landmark will ensure that permitted uses encourage preservation of historic qualities."

> "Possesses distinctive buildings or natural features that require special consideration to ensure appropriate development, preservation, or rehabilitation. In order to be considered distinctive, it must be demonstrated that:
>
> "1. The area is characterized by buildings that merit preservation in order to protect their special features; or
>
> "2. The area contains natural features that have been identified by the city as worthy of special treatment or preservation."

The city responds that there is no reason why the city cannot draw the distinctions that are drawn in Ordinance 20418 and regulate building heights differently within the R-3 and R-4 zones in the designated 16-block area and regulate required off-street parking differently in the two university neighborhoods. The city goes on to argue that not only is there no legal prohibition against making such regulatory distinctions within a base zone and within the generally applicable parking standards at EC Table 9.6410, the standards for creation of a Special Area Zone make it clear that the desired regulatory distinctions could not be accomplished via a Special Area Zone. That regulatory distinction has nothing to do with "buildings that merit preservation" or "natural features that [are] worthy of special treatment or preservation," as is required under EC 9.3020(1)(b).

We agree with the city. The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

ORS 227.186(2) requires that legislative acts relating to zoning be adopted by ordinance.[6] EC 9.1050 requires that the boundaries of any zone must be shown on the official zoning map.[7] The new multiple family off-street parking standards apply only in the

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[6] ORS 227.186(2) provides:

> "All legislative acts relating to comprehensive plans, land use planning or zoning adopted by a city shall be by ordinance."

[7] EC 9.1050 provides in part:

West University Neighborhood and the South University Neighborhood. Petitioner contends the city violated EC 9.1050 and 9.3010 and ORS 227.186(2) because the boundaries of the two neighborhoods were set by city resolution rather than by ordinance, and the boundaries of those two neighborhoods are not shown on the city's official zoning map.

The city's response is twofold. First, the city contends that Ordinance 20418 does not change the boundaries of the R-3 or R-4 zone. We understand the city to contend that because those boundaries were not changed, no amendment of the city's official zoning map was required, and EC 9.1050 is not implicated. Second, the city contends that the ORS 227.186(2) requirement that legislative acts relating to zoning be adopted by ordinance did not take effect until 1998, whereas the resolutions establishing the two neighborhoods were adopted many years earlier, in the 1980s. We understand the city to contend that even if ORS 227.186(2) might apply prospectively to preclude future amendments to the boundaries of those neighborhoods by resolution, for purposes of applying the new parking regulations, ORS 227.186(2) does not apply retroactively to preclude application of the new off-street parking requirements to neighborhoods that were delineated by resolution before the statute took effect. We agree with the city.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

ORS 197.295 through 197.314 and 197.475 to 197.490 are referred to as the needed housing statutes. OAR chapter 660 division 8 is the Land Conservation and Development Commission (LCDC) administrative rule that was adopted to implement the needed housing statutes and Statewide Planning Goal 10 (Housing). OAR 660-008-0025 allows the city to defer rezoning land that is within an urban growth boundary to the maximum planned

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> "Zone boundaries shall be depicted on an official map titled, 'Eugene Zoning Map.' Overlay zone boundaries shall be indicated on the 'Eugene Zoning Map,' or on an official map titled, 'Eugene Overlay Zone Map.' * * *"

residential density, if such deferral is justified and subject to clear and objective rezoning standards.[8]

The Eugene/Springfield Metro Area General Plan (Metro Plan) designates the affected university neighborhoods "High Density." According to the Metro Plan, the High Density designation calls for "[o]ver 20 dwelling units per gross acre (could translate to over 28.56 units per net acre depending on each jurisdiction's implementation measures and land use and development codes)." Metro Plan Policy A.9. As already noted, the city's R-3 zone permits up to 56 units per net acre and the R-4 zone permits up to 112 units per net acre. By reducing the 50-foot and 120-foot maximum building height maximum in the 16-block area, petitioner argues the city has effectively downzoned this area in a way that is inconsistent with the Metro Plan and OAR 660-008-00025. We understand petitioner to argue the new off-street parking requirements have the same effect for the larger South and West University Neighborhoods.

Petitioner's argument is without merit. The Metro Plan calls for 20 units per gross acre or 28.56 units per net acre. The R-3 zone permits up to 56 units per net acre and the R-4 zone permits up to 112 units per net acre. The permissible maximum density under the R-3 zone is twice what the Metro Plan calls for and the permissible maximum density in the R-4 zone is well over three times what the Metro Plan calls for. Therefore, the City of Eugene

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[8] OAR 660-008-0025 provides:

> "A local government may defer rezoning of land within an urban growth boundary to maximum planned residential density provided that the process for future rezoning is reasonably justified. If such is the case, then:
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> "(1) The plan shall contain a justification for the rezoning process and policies which explain how this process will be used to provide for needed housing.
>
> "(2) Standards and procedures governing the process for future rezoning shall be based on the rezoning justification and policy statement, and must be clear and objective."

has not *deferred* rezoning to the density called by in the Metro Plan, it has chosen to zone for much higher densities, and OAR 660-008-0025 is simply inapplicable.

Even if OAR 660-008-0025 could be read to preclude new land use regulations that might have the indirect effect of making it difficult to achieve the densities called for under the Metro Plan, petitioner comes nowhere near showing that is the case here. As we have already noted, the existing R-3 and R-4 zoning is unaffected by the challenged amendments, and there is at best conflicting evidence in the record concerning whether the amendments call into question whether in some circumstances it may not be possible to achieve the 112 unit per net acre maximum density allowed under the EC in the R-4 zone. There is simply no credible evidence in the record that the disputed amendments will make it no longer possible to achieve the more modest 28.56 units per net acre called for under the Metro Plan.[9]

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

ORS 197.307(6) requires that "[a]ny approval standards, special conditions and the procedures for approval" that are adopted by the city and applied to needed housing as defined by ORS 197.303 must be "clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."[10]

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[9] We recognize that other city zoning districts may allow development at densities that are less than required under Metro Plan Policy A.9 and that the higher densities allowed in the R-3 and R-4 zoning may be necessary to offset those lower densities so that the city as a whole complies with the minimum density required by Metro Plan Policy A.9. However, petitioner does not argue that this consideration is in play here and we do not consider the issue further.

[10] The text of ORS 197.307(6) is set out below:

> "Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

The new off-street parking standard imposed by Ordinance 20418 in the two university districts requires an increasing number of parking spaces for multiple family dwelling units, depending on how many bedrooms a multiple family dwelling unit has. The EC does not define the term "bedroom." *Webster's Third New Int'l Dictionary*, 196 (1981) defines a bedroom as "a room furnished with a bed and intended primarily for sleeping." According to petitioner the same hypothetical apartment unit that is depicted on the drawing that appears between pages 13 and 14 of its petition for review could be found to have anywhere from one to four bedrooms depending on whether the applicant expressed an intent to use the rooms shown as a bedroom, den, exercise room or office. Petitioner contends that the bedroom-based off-street parking standard is not "clear and objective," and for that reason violates ORS 197.307(6).

We seriously question whether the amendment to EC Table 9.6410 to make the required off-street parking space for multiple family dwellings in the two university districts depend on the number of bedrooms constitutes an "approval standard," within the meaning of ORS 197.307(6). To begin with, EC Table 9.6410 is probably more accurately described as a performance standard than a standard that determines whether an application for a multiple family dwelling can be approved. As the city explains in its brief, an applicant for needed housing that is subject to EC Table 9.6410 presumably will indicate on its application how many bedrooms are included in a request for approval of a multiple family apartment building. The city would rarely, if ever, have reason to question the applicant's representation regarding how many bedrooms a proposal will have. The required off-street parking would be computed accordingly, and the application would be approved and the apartment would be built and occupied. If it later turns out that exercise rooms, dens and offices are being rented as bedrooms, the city might face the prospect of an enforcement action. But that possibility is no different that the possibility that the apartment building might run afoul of any number of performance standards after it is initially approved.

Even if the amended EC Table 9.6410 is properly viewed as an "approval standard," within the meaning of ORS 197.307(6), we believe it is sufficiently "clear and objective." As we explained in *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 156-58 (1998), *aff'd* 158 Or App 1, 970 P2d 685 (1999), the needed housing statutes were derived from LCDC's St. Helens Housing Policy. We concluded that under the St. Helens Housing Policy:

> "'Needed housing' is not to be subjected to standards, conditions or procedures that involve subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community. Such standards, conditions or procedures are not clear and objective and could have the effect 'of discouraging needed housing through unreasonable cost or delay.'" 35 Or LUBA at 158.

Basing the required number of parking spaces on the number of bedrooms seems quite unlike the "adverse impact" or "compatibility" standards that were prescribed as review criteria for needed housing under the St. Helens Housing Policy. Admittedly, at least the illusion of a lack of clarity can be created in even the clearest of statutory language. However, in view of the regulatory function that the number of bedrooms serves in EC Table 9.6410, we do not believe the needed housing statutes require more clarity or objectivity. At the time of approval, it would appear that the number of bedrooms for purposes of computing the required off-street parking is entirely within the control of the applicant, subject to later action by the city in the event that rooms that were not proposed or approved as bedrooms subsequently are used as such.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

The EC is a city "land use regulation," within the meaning of ORS 197.015(11). Under ORS 197.835(7)(a), LUBA must reverse or remand an amendment to a land use regulation if the land use regulation amendment is "not in compliance with the comprehensive plan[.]" The City of Eugene's comprehensive plan is made up of a number of

documents. Two of those documents are the Metro Plan and the West University Refinement Plan. Petitioner argues under its fifth assignment of error that Ordinance 20418 is inconsistent with certain Metro Plan and West University Refinement Plan policies.

In addressing the Metro Plan and its refinement plans, the city's findings explain:

> "The code amendments include minor changes to the Land Use Code that address issues raised by the community that are primarily related to residential development and lot configuration standards, without raising significant policy issues. Given the minor nature of these amendments, there are no relevant Metro Plan policies affected by this action. Furthermore, the amendments do not address any adopted refinement plans. Therefore, no refinement plan is affected by this action." Record 31.

Before turning to petitioner's specific challenge, we note that while local law may require findings for legislative land use decisions, and by statute some land use decisions must be supported by findings without regard to whether they are quasi-judicial or legislative, there is no specific, generally applicable legal requirement that cities must adopt findings to support legislative land use decisions. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435, 451, *aff'd* 185 Or App 408, 61 P3d 281 (2002); *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560, 563-64 (1994); *Von Lubken v. Hood River County*, 22 Or LUBA 307, 313-14 (1991). Nevertheless, even without a generally applicable legal requirement that legislative land use decisions must in all cases be supported by findings, for LUBA and the appellate courts to perform their review function, "there must be enough in the way of findings or accessible material in the record of the legislative act to show that applicable criteria were applied and that required considerations were indeed considered." *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002). With that understanding of our standard of review in this matter, we turn to petitioner's arguments.

A. West University Refinement Plan Policy 3

West University Refinement Plan Policy 3 requires, among other things, that the city "review parking requirements for residential development with the purpose of *reducing* the

required number of parking spaces."[11] (Emphasis added.) Petitioner contends that because Ordinance 20418 increases the required number of parking spaces for multiple family dwellings in the West University Neighborhood, rather than reducing them, the ordinance is inconsistent with the policy.

The city responds in its brief that West University Neighborhood Refinement Plan Policy 3 was adopted when that refinement plan was adopted in 1982. According to the city, in 1993 it updated the EC and adopted the requirement that multiple family development must provide only one off-street parking space per unit. The city contends that there is evidence in the record that the old one-space off-street parking space standard "was not working in the University area and it needed to be revised." Brief of Respondent 17. The city contends that this "policy does not prohibit the City from revisiting and adjusting the way in which it has implemented the policy." *Id*.

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[11] West University Refinement Plan Policy 3 provides:

> "The City of Eugene will update its Land Use Code and that effort shall particularly take into account the need to:
>
> "-- reduce non-residential uses permitted in the R-3 and R-4 zones.
>
> "-- redefine usable open space.
>
> "-- enable infilling on newly created small lots.
>
> "-- enable alley access as the primary access to newly created lots.
>
> "-- reduce the minimum lot size.
>
> "-- increase the flexibility of development standards (for example to enable more efficient use of open space, shared parking, and more extensive use of public rights-of-way).
>
> "-- *review parking requirements for residential development with the purpose of reducing the required number of spaces per unit in the plan area*.
>
> "-- amend the commercial zoning in the City Code to provide a greater range of commercial zones." (Emphasis added.)

There is evidence in the record that parking is a problem near the university and that the old one-space per unit parking standard is likely contributing to that parking problem. However, it seems to us that it was entirely foreseeable in 1993 that "reducing the required number of parking spaces per unit in the plan area" could either create or exacerbate parking problems in the university area, if steps beyond simply reducing the required number of parking spaces were not taken. From the decision and the evidence in the record that the parties have called to our attention, we cannot tell why a decision to increase off-street parking is consistent with a policy that calls for reducing off-street parking. Although we agree with the city that West University Neighborhood Refinement Plan Policy 3 need not be interpreted to preclude the city from adjusting how the city chooses to implement that policy, the city needs to explain how a decision to increase off-street parking is consistent with a policy that calls for reducing off-street parking. Because there are no findings that provide that explanation, we agree with petitioner that remand is required. *Citizens Against Irresponsible Growth v. Metro.*

This subassignment of error is sustained.

B. Metro Plan Housing Policies

Metro Plan Policy A.2 provides in part that "[r]esidentially designated land within the UGB should be zoned consistent with the Metro Plan and applicable plans and policies[.]" As previously noted, Metro Plan Policy A.9 calls for residential dwelling densities of 20 dwelling units per gross acre and 28.56 dwelling units per net acre. Metro Plan Policy A.14 provides that the city is to "[r]eview local zoning and development regulations periodically to remove barriers to higher density housing and to make provision for a full range of housing options." Petitioner argues Ordinance 20418 is inconsistent with these policies because it introduces new barriers to higher density and does not allow the density envisioned by the Metro Plan.

As we have already explained, the EC allows significantly higher densities in the R-3 and R-4 zones than is required under Metro Plan Policy A.9, and the challenged decision does not change that zoning. We are not persuaded by any of petitioner's arguments that the challenged amendments will leave the city unable to comply with the 28.56 dwelling units per net acre standard that is set by Metro Plan Policy A.9. As far as we can tell, Ordinance 20481 is consistent with Metro Plan Policy A.2 or A.9.

Petitioner appears to interpret Metro Plan Policy A.14 to prohibit the city from adopting any land use regulation amendments that might ultimately prove to be "barriers to higher density housing [or] provision [of] a full range of housing options." That is not what the policy says. Metro Plan Policy A.14 directs the city to review city land use regulations periodically to "remove barriers to higher density housing and to make provision for a full range of housing options." Metro Plan Policy A.14 seems to recognize that the city's ability to predict the ultimate impact of land use regulations on housing density and options at the time land use regulations are adopted or amended is imperfect. Metro Plan Policy A.14 simply requires that the city assess and correct, on a periodic basis, any land use regulations that prove to be a barrier to housing density or providing a full range of housing options. While Metro Plan Policy A.14 probably would bar a land use regulation that on its face will be a barrier to achieving desired housing density or housing options, and petitioner apparently believes that is the case with Ordinance 20418, we do not agree.

This subassignment of error is denied.

C. Metro Plan Impervious Surface Policy

Metro Plan Policy G.17 provides that the city should "[i]nclude measures in local land development regulations that minimize the amount of impervious surface in new development[.]"[12]

Petitioner contends that because residential development in the areas affected by Ordinance 20418 will have to be accommodated in shorter buildings in some cases and will have to provide more parking it is logical to assume there will be more impervious surface and Ordinance 20418 therefore violates Metro Plan Policy G.17.

As was the case with petitioner's reading of Metro Plan Policy A.14, petitioner misreads Metro Plan Policy G.17 to require something that it does not require. Metro Plan Policy G.17 does not prohibit any amendment of the EC that might lead to individual development that includes more impervious surfaces. Metro Plan Policy G.17 requires the city to include measures in its land use regulations that will minimize impervious surfaces; it is not a blanket ban on land use regulation amendments that might, in particular cases, lead to more impervious surfaces.

Where a land use regulation amendment would inevitably lead to increased impervious surfaces, it is possible that we would require that the city adopt findings to explain why such an amendment is consistent with Metro Plan Policy G.17. However, petitioner's assumption that the theoretically taller buildings with fewer parking spaces that were possible under the EC before Ordinance 20418 would inevitably result in *less* impervious surface and that the shorter buildings with more parking that will likely result

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[12] Both petitioner and the city state that this policy is Metro Plan Policy G.18. According to the Metro Plan that is available on the city's website, which we assume is the current and applicable version of the Metro Plan, the impervious surface policy appears at Metro Plan Policy G.17 and the full text of that policy is as follows:

> "Include measures in local land development regulations that minimize the amount of impervious surface in new development in a manner that reduces stormwater pollution, reduces the negative effects from increases in runoff, and is compatible with *Metro Plan* policies."

under the Ordinance 20418 amendments will inevitably result in *more* impervious surface is simply too tenuous. As intervenors-respondents point out, apparently few developers of multiple family dwellings in the area are currently taking advantage of the higher maximum building heights before Ordinance 20418, and even if they were it does not necessarily follow that the smaller footprint of such buildings would result in fewer impervious surfaces. In addition, if parking is provided underneath multiple family development, there would be no increase in exposed impervious surface.

This subassignment of error is denied.

The fifth assignment of error is sustained in part and denied in part.

SIXTH ASSIGNMENT OF ERROR

Under its sixth assignment of error, petitioner argues the city failed to demonstrate that the amendments adopted by Ordinance 20418 are consistent with the Transportation Planning Rule (TPR-OAR chapter 660, division 12) and Metro Plan and TransPlan Policies.

A. Significant Affect on Transportation Facilities

As potentially relevant in this appeal, under the TPR an amendment to a land use regulation would significantly affect a transportation facility if "[a]s measured at the end of the planning period identified in the adopted transportation system plan," the land use regulation amendment would:

> "(A) Allow land uses or levels of development that would result in types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;
>
> "(B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan; or
>
> "(C) Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan." OAR 660-012-0060(1)(c).

If a land use regulation would significantly affect a transportation facility, OAR 660-012-0060(1) requires that a local government "put in place measures * * * to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the [significantly affected] facility." Under OAR 660-012-0060(2) those required measures may include:

> "(a) Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.
>
> "(b) Amending the TSP or comprehensive plan to provide transportation facilities, improvements or services adequate to support the proposed land uses consistent with the requirements of this division; such amendments shall include a funding plan or mechanism consistent with section (4) or include an amendment to the transportation finance plan so that the facility, improvement, or service will be provided by the end of the planning period.
>
> "(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes.
>
> "(d) Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.
>
> "(e) Providing other measures as a condition of development or through a development agreement or similar funding method, including transportation system management measures, demand management or minor transportation improvements. Local governments shall as part of the amendment specify when measures or improvements provided pursuant to this subsection will be provided."

We understand petitioner to argue that Ordinance 20418 will significantly affect a transportation facility, although petitioner does not identify which transportation facilities it believes will be significantly affected. We also understand petitioner to argue that the city has failed to adopt one or more of the mitigation measures required by OAR 660-012-0060(1) and 660-012-0060(2). Perhaps more precisely, we understand petitioner to contend that the city improperly found that Ordinance 20418 will not significantly affect any transportation facilities, without adequately explaining why the city believes that is the case.

The city adopted the following to address whether Ordinance 20418 will significantly affect a transportation facility:

> "Due to the minor nature of these amendments, the amendments do not affect the provision of safe, convenient and economic transportation systems and do not significantly affect any transportation facilities." Record 30.

Petitioner and the city have very different views about the likely impact of the Ordinance 20418 increased off-street parking requirement. Petitioner believes that with additional off-street parking places it necessarily follows that additional cars will be introduced into the South and West University Neighborhoods that would otherwise not travel to and through those neighborhoods. The city (and intervenors-respondents), on the other hand, believe that the students who now share the multi-bedroom apartments that only require a single off-street parking space per apartment are in most cases already bringing their cars to school, and the effect of requiring more off-street parking spaces will be to provide an off-street parking space to park cars that, for the most part, would otherwise be traveling the streets of the South and West University Neighborhoods anyway. Under petitioner's theory, the additional parking spaces equal an additional car for almost every parking space; under the city's and intervenors-respondents' theory additional parking spaces will not significantly add new cars and simply would reduce the congestion that is generated when the cars owned by apartment residents are driven around in search of one of the limited supply of on-street parking spaces.

There is not a great deal of evidence to support either theory, but intervenors-respondents cite some testimony that lends some support to their position. Record 705-06, 846-47.[13] Given (1) the lack of evidence that the additional parking spaces that will be required under Ordinance 20418 will materially increase the total number of vehicle trips in

[13] We also note that while we have rejected petitioner's contention that the amended stepped-up maximum building heights will necessarily decrease the density of development, petitioner fails to recognize that that aspect of its position in this matter, if true, likely would reduce the transportation facility impact of Ordinance 20418.

these neighborhoods, (2) the existence of some evidence that trips will not materially increase, and (3) petitioner's complete failure to identify which transportation facilities it believes will be significantly affected, we do not agree that the city's findings are inadequate to establish that Ordinance 20418 will not significantly affect West and South University Neighborhood transportation facilities.

This subassignment of error is denied.

B. Metro Plan and TransPlan Policies

TransPlan, which was adopted to comply with Statewide Planning Goal 12 (Transportation) and the TPR, calls for the city to designate nodes and to implement a nodal development strategy to reduce automobile dependence and increase use of other forms of transportation. Petitioner contends Ordinance 20418 violates a number of TransPlan Policies.

"**Land Use Policy #1: Nodal Development.**

> "Apply the nodal development strategy in areas selected by each jurisdiction that have identified potential for this type of transportation-efficient land use pattern."

Areas within the West and South University Neighborhoods are identified in TransPlan as potential nodes.

"**Land Use Policy #3: Transit-Supportive Land Use Patterns**.

> "Provide for transit-supportive land use patterns and development, including higher intensity, transit-oriented development along major transit corridors and near transit stations; medium- and high-density residential development within ¼ mile of transit stations, major transit corridors, employment centers, and downtown areas; and development and redevelopment in designated areas that are or could be well served by existing or planned transit."

Petitioner contends that the additional off-street parking mandated by Ordinance 20418 is the antithesis of "higher intensity, transit-oriented development along major transit corridors."

"Land Use Policy #5: Implementation of Nodal Development

> "Within three years of TransPlan adoption, apply the ND, Nodal Development designation to areas selected by each jurisdiction, adopt and apply measures to protect designated nodes from incompatible development and adopt a schedule for completion of nodal plans and implementing ordinances."

The Land Use Policy #5 three-year deadline to apply the ND designation and apply measures to protect nodes from incompatible development was requested by DLCD.[14] According to petitioner, that three-year deadline expired four years ago and the city has yet to designate nodes. Petitioner contends that requiring additional off-street parking for multiple family development in areas of the city that have been identified as potential nodal development areas is inconsistent with the above TransPlan policies. In particular, petitioner argues that introducing such additional parking is inconsistent with the city's obligation under Land Use Policy #5 to "protect designated nodes from incompatible development."

The city adopted the following findings to reject arguments that were presented to the city below that Ordinance 20418 is inconsistent with TransPlan's nodal development policies:

> "* * * DLCD raises a concern that the increase in parking requirements for new multi-family developments in the West University and South University neighborhoods will encourage automobile use in the nodal area. Like the South University neighborhood, a portion of the West University neighborhood is identified in the TransPlan as being part of a 'Potential Nodal Development Area,' but no portion of the neighborhood has received the Nodal Development Area designation in the Metro Plan and no portion has been rezoned to include the /ND Nodal Development overlay zone.
>
> "It is not clear that any of the areas affected by the height and parking amendments will be designated and zoned as nodal areas for purposes of the

[14] The text in TransPlan following Land Use Policy #5 explains:

> "This policy was added at the request of the Department of Land Conservation and Development Commission. The nodal development strategy anticipates a significant change in development patterns within proposed nodes. Development of these areas under existing plan designations and zoning provisions could result in development patterns inconsistent with nodal development. This policy documents a commitment by the elected officials to apply the new /ND nodal development Metro Plan designation and new zoning regulations to priority nodal development areas within three years of TransPlan adoption, subject to available funding."

> 2015 performance measure. The transition requirement applies only to the R-3 * * * and R-4 * * * zoned land just south of the University* * *. Further, the building heights in the R-3 and R-4 zones would be restricted to 35 feet only for that portion of a building located within 160 feet from the abutting boundary of, or directly across an alley from, land zoned R-1, and building heights in the R-4 zone would be restricted to 50 feet only for that portion of a building located within 175 feet of land zoned R-3, and to 75 feet for a portion of a building greater than 175 feet and up to 225 feet from land zoned R-3. *DLCD has not identified a basis for concluding that the proposed height transitions will unlawfully interfere with the region's ability to meet its 23.3% performance standard and the City finds no such basis. Further, the City finds that the modest parking requirements are necessary to address excessive demand for on-street parking resulting from the increase in multi-family developments in the area and finds that the requirements do not conflict with any nodal policy, standard or criterion*." Record 30 (emphasis added).

Petitioner first contends that the city cannot rely on its failure to take action to designate nodes within three years, as it promised to do in Land Use Policy #5, to relieve the city of any obligation to protect potential nodes from inappropriate development. We agree with petitioner on that point. However, in the findings emphasized above, the city also found that the amendments will not have the negative effect on the city's ability to achieve desired residential densities and the city's ability to meet the 23.3% nodal development performance standard that petitioner claims. Those findings also take the position that the modest amount of additional off-street parking that will be required under Ordinance 20418 does not conflict with the city's nodal development policies. Petitioner neither acknowledges nor specifically challenges those findings.

This subassignment of error is denied.

C. OAR 660-012-0035 and 660-012-0045

Petitioner argues that Goal 12 and its implementing administrative rule (the TPR) potentially apply directly to the challenged land use regulation amendment, by virtue of ORS 197.835(7)(b) and EC 9.8065(1).[15] Petitioner contends that although OAR 660-012-0060(1)

[15] ORS 197.835(7)(b) provides that LUBA must reverse or remand an amendment to a land use regulation if "[t]he comprehensive plan does not contain specific policies or other provisions which provide the basis for

describes one circumstance when local governments must apply the TPR when amending their land use regulations, it does not purport to describe the only circumstance where that may be the case.

Amendments to comprehensive plan and land use regulation requirements that were adopted to comply with the TPR clearly might render the comprehensive plan or land use regulations inconsistent with the TPR, even if they do not have a "significant affect on a transportation facility," as that concept is defined by OAR 660-012-0060(1). We agree with petitioner that in amending comprehensive plan and land use regulation requirements that were adopted to implement the TPR, the city is required to ensure that the amendments are consistent with the TPR and thus the TPR would apply directly to such amendments.

The only TPR requirements that petitioner cites under this subassignment of error are OAR 660-012-0035(5) and OAR 660-012-0045(5). OAR 660-012-0035(5) authorizes alternative ways to reduce vehicle miles traveled and the city's nodal development policies were adopted to implement 660-012-0035(5). We have already rejected petitioner's challenge based on the city's nodal development policies, and petitioner's argument here adds nothing to the arguments we have already rejected.

OAR 660-012-0045(5), among other things, requires the city to adopt land use regulations to reduce reliance on the automobile. Petitioner contends that OAR 660-012-0045(5) requires that the city

> "have regulations that: allow transit-oriented development along transit routes; implement a demand management program to meet measureable standards in the TSP; achieves a 10% reduction in the number of parking spaces in the region over the planning period; and establishes 'off-street parking maximums' in downtown and other areas, among other things." Petition for Review 24.

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the regulation, and the regulation is not in compliance with the statewide planning goals." EC 9.8065(1) requires that amendments to the EC must be "consistent with applicable statewide planning goals adopted by the Land Conservation and Development Commission."

Although it seems unlikely to us that the prior maximum building height limits in the R-3 and R-4 zone played much of a role when the city's comprehensive plan and land use regulations were acknowledged as complying with Goal 12 and the TPR, we cannot be sure that it played no role in facilitating "transit oriented developments (TODs) on lands along transit routes," as OAR 660-012-0045(5)(a) requires. And in any event it seems entirely possible that the prior one off-street parking space requirement for multiple family dwellings played a role when the city's comprehensive plan and land use regulations were acknowledged to comply with OAR 660-012-0045(5)(c)(A) requirement that the city have a parking plan which "[a]chieves a 10% reduction in the number of parking spaces per capita in the MPO." Without expressing any view on whether those prior EC provisions were adopted to comply with the TPR or were relied on to secure acknowledgment, and without expressing any view on whether the disputed amendments adopted by Ordinance 20418 may cause the EC to be inconsistent with OAR 660-012-0045(5), we agree with petitioner that the city's decision must be remanded so that the city can address those questions.

This subassignment of error is sustained.

The sixth assignment of error is sustained in part.

SEVENTH ASSIGNMENT OF ERROR

Under its seventh assignment of error, petitioner argues that Ordinance 20418 violates Statewide Planning Goal 6 (Air, Water and Land Resources Quality). Goal 6 is set out below:

> "**To maintain and improve the quality of the air, water and land resources of the state.**
>
> "All waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. With respect to the air, water and land resources of the applicable air sheds and river basins described or included in state environmental quality statutes, rules, standards and implementation plans, such discharges shall not (1) exceed the carrying capacity of such resources, considering long range

needs; (2) degrade such resources; or (3) threaten the availability of such resources."[16]

The amicus brief submitted in support of this assignment of error contends that Ordinance 20418 will contribute to global warming and violates Goal 6.

Petitioner's and amici's thesis is relatively simple. The new lower maximum building heights in the R-3 and R-4 zones in the 16-block area will prevent development at the maximum densities allowed in the R-3 and R-4 zones in the 16-block area next to the university and thereby reduce the capacity of that area to provide housing. According to petitioner, this means "some portion of the student population will have to live further away from the university," and petitioner speculates that these displaced students will drive to school, rather than walk or ride their bikes, and thus add to air pollution and global warming. Petition for Review 25. With regard to the increased off-street parking required by Ordinance 20418, petitioner contends that the additional off-street parking spaces will displace bedrooms and increase auto commuting with resulting air quality and global warming impacts. According to petitioner, "[w]ithin the development envelope on any site, there is a simple trade-off between bedrooms for students and bedrooms for cars." *Id*. at 26. Finally, petitioner argues that with more off-street parking spaces more students who do not have cars now, because they are discouraged by the lack of off-street parking, will be encouraged to get cars and drive them.

If petitioner's and amici's thesis had support in the evidentiary record, we would likely require the city to better explain why it believes the changes adopted by Ordinance 20418 are small and will not have air quality impacts that could reasonably be expected to implicate Goal 6. But petitioner's and amici's thesis has little or no support in the evidentiary record. As we have already explained, the reduced three step-ups in maximum

[16] Petitioner also cites three Metro Plan Policies that petitioner contends were adopted to implement Goal 6, but petitioner does not argue that those policies impose requirements that are not imposed by Goal 6.

building height adopted by Ordinance 20418 will not make it impossible for developers of affected multiple family development to achieve the maximum allowed densities in the R-3 and R-4 zone. There is simply no credible evidence to support petitioner's contention to the contrary.

With regard to the additional off-street parking required by Ordinance 20418, as we have already explained, the evidentiary record does not support a conclusion that those additional parking spaces will prevent development from achieving the maximum densities allowed in the R-3 and R-4 zones. In some cases those additional parking spaces may require that parking be put underground to achieve the maximum allowed densities, but petitioner's apparent assumption that parking spaces and bedrooms are a one-to-one tradeoff is not supported by the evidentiary record. Finally, as we have already explained, there is some evidence in the record that the students that occupy the multi-bedroom apartment units that are the target of the new off-street parking requirement already have cars and will not be induced to bring their cars to the neighborhood for the first time by the new off-street parking requirements. There is no credible evidence that a material number of students are discouraged from bringing their cars under the current limited requirement for off-street parking and would be induced to bring their cars to the neighborhood by the new off-street parking standard.

Before the city is obligated to consider whether a land use regulation amendment implicates its obligations under Goal 6 to ensure that the amendment will not lead to violation of air quality standards, there must be at least some minimal basis for suspecting that the land use regulation amendment will have impacts on air quality that would threaten to violate air quality standards. In this case, petitioner's unsupported assumptions concerning the impacts of Ordinance 20418 failed to provide such a minimal basis for suspecting Ordinance 20418 would have any significant impact on air quality, much less that

any such impacts would threaten to violate applicable state or federal environmental quality statutes, rules and standards.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

Petitioner's eighth assignment of error challenges Ordinance 20417. Section 17 of Ordinance 20417 amends EC 9.6790 by adding a new subsection (6) to EC 9.6790. EC 9.6790 was enacted by a prior ordinance that was not appealed—Ordinance 20369. Ordinance 20369 was adopted on June 14, 2006 and took effect on July 14, 2006. EC 9.6790 is set out below, with the new subsection (6) that was added by section 17 of Ordinance 20417 shown in italics:

> "**Stormwater Management Manual**. In order to implement Section 9.6791 through 9.6797 of this code, the City Manager shall adopt in accordance with EC 2.019, City Manager – Administrative and Rulemaking Authority and Procedures, a Stormwater Management Manual. The Stormwater Management Manual may contain forms, maps and facility agreements and shall include requirements that are consistent with the following goals:
>
> "(1) Reduce runoff pollution from development by reducing impervious surfaces and capturing and treating approximately 80% of the average annual rainfall.
>
> "(2) Control and minimize flows from development in the Headwater Areas using a variety of techniques to release water to downstream conveyance systems at a slower rate and lower volume, thereby reducing the potential for further aggravation of instream erosion problems.
>
> "(3) Emphasize stormwater management facilities that incorporate vegetation as a key element, and include design and construction requirements that ensure landscape plant survival and overall stormwater facility functional success.
>
> "(4) Operate and maintain stormwater management facilities in accordance with facility-specific O & M Plans.
>
> "(5) Reduce pollutants of concern that are generated by identified site uses and site characteristics that are not addressed solely through the pollution reduction measures by implementing additional specific source control methods including reducing or eliminating pathways

that may introduce pollutants into stormwater, capturing acute releases, directing wastewater discharges and areas with the potential for relatively consistent wastewater discharges to the wastewater system, containing spills on site, and avoiding preventable discharges to wastewater facilities, surface waters or ground waters.

"6. *Except as otherwise allowed by this land use code, allow disturbances or development within drainage ways only when all of the following conditions exist:*

"*(a) The disturbance or development will not impede or reduce flows within the drainage way;*

"*(b) The disturbance or development will not increase erosion downstream; and*

"*(c) The constructed pipe system is sized to convey all of the runoff from the upstream watershed when the upstream watershed is completely developed*."

According to the city, EC 9.6790(1) through (5) has been an acknowledged part of the EC since 2006. In addition, at about the same time that EC 9.6790(1) through (5) was adopted by Ordinance 20369 on June 14, 2006, the City Manager adopted the Stormwater Management Manual that EC 9.6790(1) through (5) calls for. According to the city, that Stormwater Management Manual was submitted to DLCD following post acknowledgment procedures and is now deemed acknowledged. In this assignment of error, petitioner challenges the city's decision to add subsection (6) to EC 9.6790.

A. Improper Delegation to the City Manager

Petitioner first argues that Ordinance 20417 improperly delegates the legislative task of fleshing out the directive in EC 9.6790(6) to the City Manager, which will be adopted by the city by administrative rule making rather than by ordinance. Petitioner contends that this delegation is improper and violates ORS 227.186(2). ORS 227.186(2) directs that "[a]ll legislative acts relating to comprehensive plans, land use planning or zoning adopted by a city shall be by ordinance."

The city responds that Ordinance 20417 did not delegate responsibility for adopting a Stormwater Management Manual to the City Manager. That delegation was accomplished by Ordinance 20369, which is not subject to review in this appeal of Ordinance 20417. According to the city, if petitioner believes the delegation is legally improper, petitioner may challenge the City Manager's next exercise of rulemaking under in EC 9.6790. We agree with the city.

This subassignment of error is denied.

B. Petitioner's Remaining Arguments

Petitioner contends that EC 9.6790(6) violates the OAR 660-008-0015 and ORS 197.307(6) requirements that approval standards that are applied to development of needed housing must be clear and objective.[17] Petitioner also argues that even if the EC 9.6790(6) standards are clear and objective, they are impossible to comply with and render the city's clear and objective route for approval of needed housing illusory. *See Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 420 (2002) (where a local government adopts both a clear and objective and optional discretionary approval standards under ORS 197.307(3)(d), the option to seek approval of needed housing under clear and objective standards is illusory if those clear and objective standards are impossible to satisfy).[18] Finally, petitioner argues

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[17] OAR 660-008-0015 provides as follows:

> "Local approval standards, special conditions and procedures regulating the development of needed housing must be clear and objective, and must not have the effect, either of themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

The text of ORS 197.307(6) was set out earlier at footnote 10.

[18] ORS 197.307(3)(d) provides:

> "In addition to an approval process based on clear and objective standards as provided in paragraph (b) of this subsection, a local government may adopt an alternative approval process for residential applications and permits based on approval criteria that are not clear and objective provided the applicant retains the option of proceeding under the clear and objective standards or the alternative process and the approval criteria for the alternative process comply with all applicable land use planning goals and rules."

the city erred by failing to assess the impact of EC 9.6790(6) on the city's inventory of residential, commercial and industrial lands. Petitioner contends EC 9.6790(6) will render much of that land unbuildable and leave the city with an inadequate supply of land for residential, commercial and industrial development.

The city responds that petitioner misreads the legal effect of EC 9.6790(6). As originally enacted, EC 9.6790 directed the City Manager to adopt a Stormwater Management Manual that was consistent with the goals set out at EC 9.6790(1) through (5). Ordinance 20417 does not change EC 9.6790(1) through (5) in any way. As we have already noted, the City Manager has adopted a Stormwater Management Manual. All that Ordinance 20417 does is add some additional goals that the City Manager must consider. The goals set out in EC 9.6790(6) do not themselves apply to needed housing and because they do not apply to needed housing they could not be impossible to comply with. Neither do they have any effect on the city's inventory of residential, commercial or industrial lands. The City Manager's action to implement EC 9.6790(6) may have all of those effects and may run afoul of OAR 660-008-0015, the needed housing statutes, and the city's obligation to ensure an adequate supply of land for residential, commercial and industrial development. However, EC 9.6790(6) itself does not have any of those effects.[19]

The eighth assignment of error is denied.

NINTH ASSIGNMENT OF ERROR

ORS 227.186(4) and (5) impose detailed statutory notice requirements, commonly known as "Ballot Measure 56 notice," for city decisions that rezone property. Under its ninth assignment of error, petitioner argues that both Ordinance 20417 and 20418 "rezoned"

[19] The parties suggest that the City Manager may have adopted standards in the Stormwater Management Manual like those that are required by Ordinance 20417 before Ordinance 20417 was adopted. Even if that is the case, that does not change the legal effect of Ordinance 20417.

property, within the meaning of ORS 227.186(9)(b).[20] Petitioner questions whether the notice required by ORS 227.186 was given. We understand petitioner to argue the city should have given the notice required by ORS 227.186(5) and failed to do so.[21] Intervenor-petitioner claims that he "did not receive the individual notice required by ORS 227.186." Brief of Intervenor-Petitioner 1-2.

Given the broad ORS 227.186(9) definition of "rezoned," we agree with petitioner that the amendments adopted by Ordinance 20418 "rezoned" property. *See* n 21. However, given the limited legal effect of the amendment adopted by section 17 of Ordinance 20417, we do not agree that section 17 of Ordinance 20417 rezoned property. That is the only section of Ordinance 20417 that petitioner argues rezoned property. Because Ordinance 20418 rezoned property, the city was required to give the individual written notice required by ORS 227.186(4) and (5) for Ordinance 20418.

ORS 227.186(4) requires that "individual written notice" "be mailed to the owner of each lot or parcel of property that [an] ordinance proposes to rezone." That individual written notice must be mailed "[a]t least 20 days but not more than 40 days before the date of the first hearing."[22] ORS 227.186(5) sets out fairly detailed requirements with which the notice must "substantially" comply.[23]

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[20] ORS 227.186(9) provides:

> "For purposes of this section, property is rezoned when the city:
>
> "(a) Changes the base zoning classification of the property; or
>
> "(b) Adopts or amends an ordinance in a manner that limits or prohibits land uses previously allowed in the affected zone."

[21] Petitioner cites ORS 227.186(6) rather than ORS 227.186(5). However, as the city correctly notes, the detailed notice requirements of ORS 227.186(6) apply to amendments pursuant to periodic review. The amendments adopted by Ordinances 20417 and 20418 were not adopted pursuant to periodic review. The detailed notice requirements of ORS 227.186(4) and (5) apply to Ordinances 20417 and 20418, assuming they rezoned property.

[22] ORS 227.186(4) provides:

The city responds that it mailed individual written notice to all property owners within the West University and South University Neighborhoods. Record 958-76. The list of those property owners who were mailed individual written notice includes intervenor-petitioner. Record 965.[24] The city contends that its notice was mailed 30 days before the

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"At least 20 days but not more than 40 days before the date of the first hearing on an ordinance that proposes to rezone property, a city shall cause a written individual notice of a land use change to be mailed to the owner of each lot or parcel of property that the ordinance proposes to rezone."

[23] ORS 227.186(5) provides:

"An additional individual notice of land use change required by subsection (3) or (4) of [ORS 227.186] shall be approved by the city and shall describe in detail how the proposed ordinance would affect the use of the property. The notice shall:

"(a) Contain substantially the following language in boldfaced type across the top of the face page extending from the left margin to the right margin:

"_____

"This is to notify you that (city) has proposed a land use regulation that may affect the permissible uses of your property and other properties.

"_____

"(b) Contain substantially the following language in the body of the notice:

"_____

"On (date of public hearing), (city) will hold a public hearing regarding the adoption of Ordinance Number_____. The (city) has determined that adoption of this ordinance may affect the permissible uses of your property, and other properties in the affected zone, and may change the value of your property.

"Ordinance Number _____ is available for inspection at the _____ City Hall located at_____. A copy of Ordinance Number _____ also is available for purchase at a cost of_____.

"For additional information concerning Ordinance Number_____, you may call the (city) Planning Department at ___-___."

_____"

[24] The statute requires that the city mail notice to property owners, it does not require that the mailed notice actually be received. Therefore, intervenor-petitioner's claim that he did not receive individual written notice is not sufficient to show a violation of ORS 227.186. In any event, as the city points out, intervenor-petitioner

initial hearing, which is within the time required by ORS 227.186(4) and that the notice substantially complied with the content requirements of ORS 227.186(5).

The individual written notice that the city gave in this matter was given within the deadline specified in ORS 227.186(4). Petitioner offers no reason to question the city's assertion that all affected property owners were mailed individual written notice. Neither does petitioner make any attempt to argue that the individual written notice that the city mailed in this matter did not substantially comply with the substantive requirements of ORS 227.186(5). Indeed petitioner's entire substantive argument in support of this assignment of error is that "[i]t is not clear from the record that the required notice was given for either of the ordinances." Petition for Review 48. Petitioner's argument under this assignment of error is not sufficiently developed to demonstrate error.

The ninth assignment of error is denied.

Our resolution of the fifth and sixth assignments of error require that Ordinance 20418 be remanded. Ordinance 20417 is affirmed.

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was aware of the local proceedings that led to adoption of both ordinances and intervenor-petitioner participated in those proceedings.